Michael K. Jeanes, Clerk of Court
*** Filed ***
05/15/2013 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000638-001 DT 05/13/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

v.

SCOTT CHRISTOPHER DELEY (001)

ANDREA A GUTIERREZ

JEFFERY MEHRENS

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 14007086.

Defendant-Appellant Scott Christopher Deley (Defendant) was charged in Phoenix Municipal Court with driving under the influence. The State contends the trial court erred in granting Defendant's Motion To Dismiss, which alleged the officer did not have probable cause to arrest him. For the following reasons, this Court reverses the ruling of the trial court.

I. FACTUAL BACKGROUND.

On November 30, 2011, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and exceeding posted speed limit by 20 m.p.h. or more, A.R.S. § 28–701.02(A)(2). The State subsequently filed an Amendment to Misdemeanor Complaint charging Defendant with driving under the extreme influence, A.R.S. § 28–1382(A)(1) (0.15 or more). Prior to trial, Defendant filed a Motion To Dismiss alleging the officer did not have probable cause to arrest him.

At the hearing on Defendant's motion, Officer James Blanco testified he was on duty on November 29, 2011. (R.T. of May 18, 2012, at 2–3.) At approximately 12:14 a.m., he was traveling south on 40th Street approaching the intersection with McDowell Road, and was driving a fully-marked Chevy Tahoe. (*Id.* at 4.) In the number 1 lane was Defendant's 2003 silver BMW. (*Id*. at 6–7, 10.) Officer Blanco stopped his vehicle in the number 2 lane so that he was parallel (perpendicular) to Defendant's rear tire. (*Id*. at 14.) The speed limit in this area was 40 miles per hour, and there was no other traffic in the area. (*Id*. at 7–8, 14.) When the light turned green, Defendant accelerated through the intersection and continued accelerating at a faster rate than normal. (*Id.* at 7–8.) Defendant changed lanes into the number 2 lane where Officer Blanco was.

(*Id*. at 6, 21.) Officer Blanco accelerated after Defendant, and when Officer Blanco's vehicle hit 70 miles per hour, Defendant's vehicle was still pulling away from him. (*Id*. at 8–9, 14.) At that point, Officer Blanco turned on his emergency lights and siren. (*Id*. at 9.) Defendant then pulled over to the right side of the Loop 202 on-ramp. (*Id*. at 9–10.)

Officer Blanco approached Defendant and asked for his driver's license. (R.T. of May 18, 2012, at 10.) Officer Blanco asked Defendant if he knew why he had stopped him, and Defendant said, "Probably speeding; probably going faster than you would have liked." (*Id*. at 10.) Defendant said he had just purchased the vehicle about a month before and "just got on the vehicle a little bit." (*Id*. at 11.)

Officer Blanco noted Defendant had a moderate odor of alcohol and had bloodshot, watery eyes. (R.T. of May 18, 2012, at 11.) He said bloodshot, watery eyes was a possible indicator that the person may be impaired. (*Id*. at 11.) He asked Defendant how much he had to drink, and Defendant at first said one drink, but then said two drinks over the last 2 hours. (*Id*. at 11.) Officer Blanco went back to his vehicle to check Defendant's driver's license and discovered Defendant had a non-extraditable arrest warrant from Snowflake. (*Id*. at 12.) Officer Blanco returned to Defendant, who was talking on his cell phone, and Defendant said he was speaking to his lawyer and would decline the field sobriety tests. (*Id*. at 12, 26.) Officer Blanco then told Defendant he was arresting him for DUI, and cited him for both driving under the influence and criminal speeding. (*Id*. at 13, 16.)

Defendant did not testify. (R.T. of May 18, 2012, at 37.) Defendant's attorney stipulated that Defendant was speeding and thus was breaking the law. (*Id*. at 9, 34.)

Defendant's attorney argued there were no signs that Defendant was impaired and thus the officer did not have probable cause to arrest. (R.T. of May 18, 2012, at 37–39.) The prosecutor argued there were signs that Defendant was impaired, and that the officer had the legal right to arrest Defendant for three things, (1) DUI, (2) criminal speeding, and (3) the arrest warrant from Snowflake. (*Id*. at 39–44.) Defendant's attorney did not dispute that Defendant could have been arrested for criminal speeding, but contended Defendant could not be charged with driving under the influence. (*Id*. at 44.) The prosecutor noted the State obtained the sample of Defendant's blood pursuant to a warrant issued by the court. (*Id*. at 44–45.) After hearing arguments, the trial court granted Defendant's Motion To Dismiss:

> Based on the facts of this case, the Court finds that there is not sufficient evidence supporting an arrest in this matter and, therefore, the motion is granted.

(R.T. of May 18, 2012, at 46.) On May 31, 2012, the State filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ERR IN RULING THERE WAS NOT SUFFICIENT EVIDENCE SUPPORTING AN ARREST.

The State contends the trial erred in finding there was not sufficient evidence supporting an arrest. In reviewing a trial court's ruling on a motion to dismiss, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez,* 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm,* 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). An officer has probable cause to arrest a person if the officer has reasonable grounds to believe the person is committing or has committed an offense. *State v. Lawson*, 144 Ariz. 547, 553, 698 P.2d 1266, 1272 (1985). In reviewing whether probable cause exists, courts look to the totality of the facts and circumstances known to the officers at the time of the arrest. *Lawson*, 144 Ariz. at 553, 698 P.2d at 1272.

In the present matter, Officer Blanco testified that, when his vehicle hit 70 miles per hour, Defendant's vehicle was still pulling away from him. (R.T. of May 18, 2012, at 8–9, 14.) Defendant's attorney stipulated that Defendant was speeding and thus was breaking the law. (*Id*. at 9, 34.) Further, Officer Blanco testified that there was an active warrant out of Snowflake for Defendant's arrest. (*Id*. at 12.) Based on the undisputed facts presented to the trial court, there were two separate legal bases for Officer Blanco to arrest Defendant. The trial court thus erred when it ruled there was not sufficient evidence supporting an arrest in this matter.

Officer Blanco did testify he arrested Defendant for DUI and not for either criminal speeding or the arrest warrant from Snowflake. An officer's subjective intent is not, however, relevant as long as there were objective factors that justified the stop:

> [T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.

Scott v. United States, 436 U.S. 128, 138 (1978).

> [R]egardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation.

United State v. Whren, 53 F.3d 371, 375 (D.C. Cir. 1995) (emphasis original), *aff'd, Whren v. United States*, 517 U.S. 806 (1996).

> But our jurisprudence makes clear that improper law enforcement motivations do not, standing alone, render an arrest unlawful.

State v. Mohajerin, 226 Ariz. 103, 244 P.3d 107, ¶ 26 (Ct. App. 2010).

> The federal circuits have interpreted these cases to hold that searches and seizures are to be examined under a standard of objective reasonableness without regard to the good or bad faith intention of a police officer, or to the underlying intent or motive of the individual officer involved.
>
> Most state courts have now adopted the view that so long as the police do no more than they are objectively authorized and legally permitted to do, their motives in making an arrest are irrelevant and not subject to inquiry. . . .
>
> [W]e agree with these courts that have adopted an objective rather than a subjective test for determining the reasonableness of an officer's search under these circumstances.

State v. Jeney, 163 Ariz. 293, 296, 787 P.2d 1089, 1092 (Ct. App. 1989) (citations omitted); *accord, State v. Spreitz*, 190 Ariz. 129, 144, 945 P.2d 1260, 1275 (1997). Because there were objective factors that justified arresting Defendant for either criminal speeding or the active warrant from Snowflake, it did not matter what Officer Blanco's subjective intent was. Because the evidence presented showed there was a valid legal basis for arresting Defendant for either criminal speeding or the active arrest warrant, the trial court erred in ruling there was not sufficient evidence supporting an arrest in this matter.

That leads to the next issue, whether the State may use the results of the testing of Defendant's blood, which apparently showed Defendant had a BAC of 0.15 or more. A driver's implied consent to submit to a BAC test does not come into effect until the driver is arrested for an offense under Title 28, Chapter 4 (Driving Under the Influence). A.R.S. § 28–1321(A). In this case, the State obtained the sample of Defendant's blood not because Defendant consented to the BAC test, but because the State obtained a search warrant from the court. (R.T. of May 18, 2012, at 44–45.) And in obtaining the search warrant for a suspect's blood, there is no requirement that the State must first show the suspect refused to consent to the BAC test:

> A refusal to take a test, though required to administratively revoke one's driver's license pursuant to A.R.S. § 28–1321, is not a requirement to the issuance of a search warrant in support of aggravated DUI.

State v. Stanley, 217 Ariz. 253, 172 P.3d 848, ¶ 22 (Ct. App. 2007). Defendant makes no claim that the court erred when it issued the search warrant that allowed the State to obtain a sample of his blood, thus Defendant has shown nothing that would preclude the State from using the results of the testing of Defendant's blood in its case.

And finally, the evidence presented showed Officer Blanco had probable cause to arrest Defendant for DUI. The applicable statute provides as follows:

> A. It is unlawful for a person to drive or be in actual physical control of a vehicle in this state under any of the following circumstances:
>
> 1. While under the influence of intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substances if the person is impaired to the slightest degree.

A.R.S. § 28–1381(A)(1). This statute prohibits a person from driving a vehicle while under the influence if the person is impaired to the slightest degree; it does not require that the person's ability to drive a vehicle is impaired:

> The legislature has prohibited a person from driving or being in actual physical control of a vehicle while impaired to the slightest degree by intoxicating liquor. It has not chosen to require any finding that the person's physical ability to drive was impaired.
>
> We find that the language added to RAJI 28.1381(A)(1)–1 is improper because it could mislead a jury. The jury could interpret it to require proof that the defendant's physical ability to drive was impaired as opposed to requiring only proof that the "person" was impaired, for example, in judgment.

State v. Miller (Oliveri), 226 Ariz. 190, 245 P.3d 454, ¶¶ 9–10 (Ct. App. 2011) (citations and footnote omitted).

In the present case, Defendant was driving a vehicle. Defendant admitted to having two drinks within the last 2 hours, and had bloodshot, watery eyes, all of which showed he was under the influence of intoxicating liquor. The question then was whether he was "impaired to the slightest degree." As noted in *Miller (Oliveri)*, this could be an impairment in judgment. In the present case, the evidence presented showed Defendant was stopped at an intersection at 12:14 a.m. when a vehicle pulled up beside him. When the light turned green, Defendant accelerated to over 70 miles per hour and changed lanes in front of the other vehicle. Defendant either did not notice the other vehicle was a fully-marked police SUV, which would mean his powers of observation were impaired, or else he knew it was a police vehicle and still chose to go over 70 miles per hour in a 40 miles per hour zone, which would show his judgment was impaired. The evidence presented thus showed Officer Blanco had probable cause to believe Defendant either was committing or had committed the offense of driving under the influence. The trial court thus erred in granting Defendant's Motion To Dismiss.

III. CONCLUSION.

Based on the uncontested evidence presented, this Court concludes the trial court erred in granting Defendant's Motion To Dismiss.

IT IS THEREFORE ORDERED reversing the ruling of the Phoenix Municipal Court, which granted Defendant's Motion To Dismiss.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

051020131230•